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BRIEF AND APPENDIX OF PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Record No. 1054

TIDEWATER CONSTRUCTION CORPORATION,
individually and as one of three joint
venturers trading as TIDEWATER-RAYMOND-KIEWIT,

RAYMOND INTERNATIONAL INC.,
individually and as one of three joint
venturers trading as TIDEWATER-RAYMOND-KIEWIT,

PETER KIEWIT SONS' CO.,
individually and as one of three joint
venturers trading as TIDEWATER-RAYMOND-KIEWIT,
Petitioners,

v.

EDWARD E. DUKE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

R. ARTHUR JETT
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Petitioners,

v.

EDWARD E. DUKE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled case on October 14, 1969.

I. CITATION TO OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia, printed in Appendix B hereto, infra, p. 2a, is reported in 210 Virginia Reports 143.

II. JURISDICTION

Judgment was entered on October 14, 1969. Rehearing was denied, Appendix B hereto, infra, p. 17a. An Order Staying Execution of Judgment was entered on November 17, 1969, Appendix B hereto, infra, p. 15a. The jurisdiction of this Court is invoked under *Title 28 United States Code Annotated Section 1257(3)* because the Supreme Court of Appeals of Virginia has here decided a federal question of substance contrary to the applicable decision of this Court. *Rule 19(1)(a) of the Revised Rules of the Supreme Court of the United States adopted April 12, 1954.*

III. QUESTION PRESENTED

The primary question to be decided is whether a shoreside mechanic, injured while working upon a vessel owned and operated by his employer, can recover from his employer for unseaworthiness or Jones Act negligence, where the vessel is out of service at the time of the accident.

IV. STATEMENT

For the sake of clarity, the parties will be hereinafter referred to by their designations in the courts below, i.e., the respondent as plaintiff and the petitioners as defendants.

The plaintiff instituted suit in the amount of One Hundred Fifty Thousand ($150,000.00) Dollars in the Corporation Court of the City of Chesapeake, Virginia, alleging personal injuries arising out of an accident which occurred on the 23rd day of April, 1966 aboard a work barge owned by the defendants then afloat in the Southern Branch of the Elizabeth River in the State of Virginia. At the time of the accident the said work barge had been out of service for approximately eight months and plaintiff who was employed

as a shoreside mechanic by the defendants was aboard said work barge for the purpose of overhauling her machinery prior to her return to service. The said overhaul had been going on for approximately five weeks prior to plaintiff's injury and continued for approximately one week thereafter.

The plaintiff alleges that he was a seaman and a member of the crew of said work barge at the time of his accident. Predicated upon said allegations he asserts a first cause of action in negligence under *Title 46 United States Code Annotated, Section 688,* commonly known as the *Jones Act* and a second cause of action under the general admiralty law alleging that said work barge was unseaworthy, either or both of which caused or contributed to his accident.

The defendants filed a *Plea in Bar to the Jurisdiction of the Subject Matter* alleging that the plaintiff was not entitled to maintain his suit in negligence under the *Jones Act* because (1) he was not a member of the crew of said work barge since said work barge then had no crew, and (2) he was aboard said work barge as a shoreside mechanic performing work not traditionally performed by a member of the vessel's crew; and further alleging that the plaintiff is not entitled to maintain his suit under the general admiralty law for unseaworthiness because said work barge was out of service at the time of plaintiff's accident and for that reason plaintiff was not entitled to a warranty of seaworthiness; and still further that if the plaintiff is not entitled to maintain his action under the "Jones Act" and is not entitled to maintain his action under the general admiralty law for unseaworthiness then his sole remedy is compensation under *the Longshoremen's and Harbor Workers Compensation Act* and he is without recourse to an action at law.

The defendants moved the Court to hear and dispose of their *Plea in Bar to the Jurisdiction of the Subject Matter* by impaneling a jury for the sole purpose of hearing and determining whether the plaintiff was a seaman and whether said work barge was out of navigation at the time of plaintiff's accident. The Court refused to impanel a jury for said purpose and ruled that the status of the plaintiff and the status of the work barge at the time of plaintiff's accident could be determined by the Court and jury at one trial. Thus said issues were reserved for disposition at the time of trial on the merits. Thereafter the Court took no further action with regard to defendants' *Plea in Bar to the Jurisdiction of the Subject Matter* and has never passed thereon.

The defendants in due time filed their answers wherein they deny any negligence on their part and further deny that said work barge was unseaworthy in any respect. The defendants further allege that the plaintiff was guilty of negligence and wrongdoing which was the sole proximate cause of his accident and still further allege that plaintiff's acceptance of compensation under *the Longshoremen's and Harbor Workers' Compensation Act* in the sum of Two Thousand Nine Hundred and Seventy ($2,970.00) Dollars constitutes an *accord and satisfaction* of his claim against the defendants. This latter defense was never passed upon by the Court.

The case was heard over a four day period beginning on October 31, 1967 and ending on November 6, 1967. At that time the jury returned a verdict in favor of the plaintiff in the amount of Ninety-five Thousand ($95,000.00) Dollars against the defendants. The defendants moved the Court to set aside the verdict as being contrary to the law and evidence and enter

final judgment in their favor. These motions were set down and heard on November 30, 1967, at which time the Court overruled the motions and entered final judgment against the defendants in accordance with the jury verdict, to all of which the defendants duly excepted.

The Supreme Court of Appeals of Virginia affirmed the Trial Court and entered its judgment on October 14, 1969.

V. REASONS FOR GRANTING THE WRIT

The plaintiff was allowed to go to the jury on two causes of action, namely (1) an alleged cause of action for unseaworthiness and (2) an alleged cause of action under the Jones Act for negligence.

As to (1) above, if the vessel was out of service at the time of plaintiff's injury, there was no warranty of seaworthiness and said cause of action must fall.

As to (2) above, plaintiff is here suing his *employer* and is entitled to do so only if he can bring himself within one of the exemptions found in the Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code Annotated, Section 901, et seq. He attempts to do so by alleging that he was a member of the crew of said vessel which exempts him from the provisions of said act, Section 902(3). However, if the vessel was out of service it had no crew and said cause of action must also fall.

Thus it is obvious that the primary question that had to be decided by the jury and by Appellate Court is whether the vessel was out of service at the time of plaintiff's injury.

For if the vessel was out of service at the time of plaintiff's injury, he has no cause of action either for unseaworthiness or Jones Act negligence.

Since the jury and the Appellate Court permitted plaintiff to recover, we must conclude that the jury and the Appellate Court determined that the vessel was *in service* at the time of plaintiff's injury. Such a determination is unwarranted under the uncontradicted facts of this case. Let's take a look at the uncontradicted facts as set forth in the Opinion of the Appellate Court.

> "The plaintiff first went to work for the defendants about March 1, 1965, when they were preparing the Big D for service in construction of the Chesapeake Light Station about thirteen miles offshore from Virginia Beach. During that construction plaintiff worked as a mechanic, looking after the air compressors, jacks and other machinery.
>
> Plaintiff introduced a cardboard model of the Big D which he had made and explained to the jury the structure of the barge and some of its equipment, pointing out its four generator units which supplied the air for operating the spuds and grippers on the vessel. The barge was not self-propelled but was towed to the work site where it was to be used. It carried four anchors for use to hold the barge in place at the work site and these anchors were operated by the workmen on the barge. It was arranged so that its crew could eat and sleep on it.
>
> During his employment on the barge at the Chesapeake Tower, the plaintiff was told that his work was satisfactory and that he would be em-

ployed on the next job, which was the construction of the Diamond Shoals Light Tower. The defendants had contracted in or before December 1964 to do that work and expected to use the Big D on the job. The Chesapeake Tower job was completed in July 1965 and plaintiff was then assigned to another job at Yorktown. He was then told, he said, that when the Yorktown work was finished 'we' would come back and make the Big D ready for sailing.

On March 14, 1966, plaintiff resumed his employment by the defendants and began helping to get the Big D ready for the Diamond Shoals job. The Big D was then afloat in the Elizabeth River, secured by lines running from the stern, from the bow and from the center. It was boarded by means of a gangplank.

The plaintiff testified that the crew then on the Big D was practically the same as had been on the Chesapeake Tower job. They were, he said, a fireman, an 'operator,' the deck crew men called the riggers, who were also the pile driving men, and a Mr. Warren. Plaintiff was hired as a mechanic and his work was maintaining the equipment on the deck of the barge. Their purpose was to put the barge in order for the work ahead at Diamond Shoals.

When the Chesapeake job was completed, parts of the equipment of the barge were taken off and stored for protection and preservation. The master mechanic, under whom the plaintiff worked, said the vessel was 'winterized' for the winter. On March 14, 1966, defendants began to prepare the Big D for the Diamond Shoals job,

which was due to be completed on May 1, 1966. This preparation required a lengthening of the spuds, certain electrical work and a general overhauling of the equipment. This work required about six weeks and was within a week of being completed when plaintiff suffered his injuries.

When plaintiff came aboard on Saturday, the day of the accident, the spuds were ready to be set in position and at the time of his injuries all four had been set. On that morning he had been told they were ready for him to hook up the jacks so the air could be applied to the grips and the equipment tested over the weekend to make the vessel ready for sailing. The cook had come aboard and supplies were being brought on the barge.

At the time of the accident the plaintiff was engaged in hooking up the fourth spud when he slipped and fell on grease which had been allowed to accumulate on the deck where he was required to work. In falling he knocked open a high pressure air valve which released high pressure air through the hose he was holding, causing him to lose control of the hose. It whipped around uncontrolled on the deck and struck the plaintiff, resulting in a severe fracture of his leg. He has been able to work only occasionally since."

From the foregoing uncontradicted facts recited in the Opinion of the Appellate Court it should be obvious that the vessel was out of service at the time of plaintiff's injury. However, for emphasis we refer specifically to the following pages of said Appellate Opinion:

Page 4

"He was then told, he said, that when the Yorktown work was finished 'we' would come back and *make the Big D ready for sailing.*"

Page 5

"On March 14, 1966, plaintiff * * * began *helping to get the Big D ready* for the Diamond Shoals job."

Page 5

"Their purpose was to *put the barge in order* for the work ahead at Diamond Shoals."

Page 5

"When the Chesapeake job was completed, *parts of equipment of the barge were taken off and stored* for protection and preservation."

Page 5

"The master mechanic, under whom the plaintiff worked, said the vessel was *'winterized'* for the winter."

Pages 5 and 6

"On March 14, 1966, *defendants began to prepare the Big D for the Diamond Shoals job,* which was to be completed on May 1, 1966. This preparation required a *lengthening of the spuds,* certain electrical work and a *general overhauling* of the equipment. This work required about six weeks and was *within a week of being completed* when plaintiff suffered his injuries."

Page 6

"On that morning he had been told they were ready for him to hook up the jacks so the air could be applied to the grips and the equipment tested over the weekend *to make the vessel ready for sailing.*"

Page 6

"At the time of the accident the plaintiff was engaged in *hooking up the fourth spud* when he slipped and fell on grease which had been allowed to accumulate on the deck where he was required to work."

Phrases such as . . . making the Big D ready for sailing, . . . helping to get the Big D ready, . . . put the barge in order, . . . parts of equipment were taken off and stored, . . . the vessel was winterized for the winter, . . . defendants began to prepare the Big D for the Diamond Shoals job, . . . this preparation required a lengthening of the spuds, certain electrical work and a general overhauling of the equipment, . . . this work required about six weeks and was within a week of being completed when plaintiff suffered his injuries, . . . at the time of the accident the plaintiff was engaged in hooking up the fourth spud, . . . *all connote that the vessel was out of service and was then being returned to service.*

Do the legal authorities support our conclusion that the vessel was out of service at the time of plaintiff's injury. We think they do. This Court's attention is directed to the textbook entitled *Norris on Maritime Personal Injuries,* (2nd Ed., 1966) Section 52 page 118, wherein it is stated.

"As was said by Judge Hoffman in Roper v.

United States,[12] 'a ship may be considered in navigation for the purpose of applying navigation laws, but not in navigation for the purpose of determining the shipowner's liability for injury to persons claiming the rights of a seaman.' Vessels drawn up on land;[13] *laid up for the winter,* placed in a laid up fleet or *in lay-up*[14] can be said to be withdrawn from navigation."
(Emphasis ours)

12—Roper v. United States, 170 F Supp 763 (DC Va 1959) affd, (1961) 368 US 20, 7 L ed 2d 1, 82 S Ct 5, 1961 AMC 2499.

13—Desper v. Starved Rock Ferry Company (1952) 342 US 187, 96 L ed 150, 72 S Ct 216, 1952 AMC 12.

14—Seneca Washed Gravel Corp. v. McManigal, 65 F2d 779, 1933 AMC 1387 (CCA2d 1933); Gonzales v. United States Shipping Board Emergency Fleet Corp., 3 F2d 168, 1925 AMC 177 (DC ED NY 1924).

In said connection this Court's attention is also directed to the textbook entitled *Norris on The Law of Seamen* (2nd Ed., 1962) Section 665 pages 804, 805 wherein it is stated:

"Since one of the essential elements in establishing the status of 'seaman' is that the vessel be in navigation, *it follows that the Jones Act remedy cannot be applied if the vessel, at the time of injury, is out of navigation.*[14]

14—Hawn v American S.S. Co., 107 F2d 999, 1940 AMC 120 (CCA2d 1939); Krolczyk v Waterways Navigation Co., 151 F Supp 873, 1958 AMC 379 (DC Mich 1957); Roper v United States, 170 F Supp 763, 1960 AMC 1730 (DC Va 1959) affd 282 F2d 413, 1960 AMC 1719 (Ca4th 1960); Maloney v State of New York, 141 NYS2d 207, 207 Misc 894 (Ct of Cls NY 1955) citing this Text, affd 3 NY 2d 356, 1957 AMC 2440 (Ct of App NY 1957); Perez v Marine Transport Lines, Inc., 160 F Supp 853, 1958 AMC 1475 (DC La 1958) citing this Text."

Thus we must conclude from the uncontradicted facts and said legal authorities that the vessel was out of service at the time of plaintiff's injury.

Having reached this point, it remains only to determine whether plaintiff can maintain his action for unseaworthiness or Jones Act negligence under such circumstances. This Court has said that he cannot. We concur. With reference thereto, this Court's attention is directed to the following cases:

> *Desper* v. *Starved Rock Ferry Co.,* (1952) 342 U.S. 187, 72 S.Ct. 216, wherein Mr. Justice Jackson speaking for the Court at page 218 (S.Ct.) said:
>
> *"To be sure, he was a probable navigator in the near future, but the law does not cover probable or expectant seamen but seamen in being.* It is our conclusion that while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that *there was no vessel engaged in navigation at the time of the decedent's death.* All had been 'laid up for the winter'. Hawn v. American S. S. Co., 2 Cir., 107 F.2d 999, 1000; cf. Seneca Washed Gravel Corp. v. McManigal, 2 Cir., 65 F.2d 779, 780. In the words of the Court in Antus v. Interocean S. S. Co., 6 Cir., 108 F.2d 185, 187 where it was held that one who had been a member of a ship's crew and was injured while preparing it for winter quarters could not maintain a Jones Act suit for his injuries: *'The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature.'"* (Emphasis ours)

West v. *United States,* (1959) 361 U.S. 118, 80 S.Ct. 189 wherein Mr. Justice Clark speaking for the Court at pages 191, 192 (S.Ct.) said:

"Petitioner contends that he comes under the doctrine of Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, and subsequent cases, holding that the warranty of seaworthiness applies to shore-based workers while on board ship and performing work traditionally done by seamen. *We do not think so.* In Sieracki, the Court said that the warranty applied because such a shore worker 'is, in short, a seaman * * * doing a seaman's work and incurring a seaman's hazards.' Id., 328 U.S. 99, 66 S.Ct. 880. The findings here however, show that, for several years, *the Mary Austin was withdrawn from any operation whatever while in storage with the 'moth ball fleet.'*

* * * * *

In short, as the trial court said, the work to be done on the vessel was equivalent to 'home port structural repairs.'

* * * * *

Here there could be no express or implied warranty of seaworthiness to any person."
(Emphasis ours)

Roper v. *United States,* (1961) 368 U.S. 20, 82 S.Ct. 5, wherein Mr. Justice Clark again speaking for the Court at page 7 (S.Ct.) said:

"Since we are unwilling to upset the trial court's factual determination that *the S. S. Harry*

Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. West v. United States, supra; Kissinger v. United States, D.C. 1959, 176 F. Supp. 828.[3] *This limitation is analogous to that applied in libels under the Jones Act, 46 U.S.C.A. § 688, where it has long been held that recovery is precluded if the ship involved is not a vessel in navigation.* Desper v. Starved Rock Ferry Co., 1952, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205; Hawn v. American S. S. Co., 2 Cir., 1939, 107 F.2d 999. (Emphasis ours)

3—The view that a vessel not in navigation extends no warranty has often been expressed in the more familiar context of to whom does the warranty extend. E.g., Union Carbide Corp. v. Goett, 4 Cir., 1958, 256 F2d 449. Implicit within such cases is the reasoning that those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness."

Thus this Court has clearly enunciated the principle that a person working aboard a vessel that is out of service is not entitled to the warranty of seaworthiness and is not entitled to sue under the Jones Act for negligence. Nothing could be clearer. No other authorities need be cited.

However, in spite of the foregoing, the Supreme Court of Appeals of Virginia has rendered an Opinion which is in conflict with the law as enunciated in *Desper* v. *Starved Rock Ferry Co.,* supra, *West* v. *United States,* supra, and *Roper* v. *United States,* supra. Said conflict should be corrected by this Court.

VI. CONCLUSION

This Court should not let stand a State Court Opinion in the maritime field which is at variance with decisions of this Court on the same subject. For that reason and for the more cogent reason that this Court should always correct error where indicated, it is respectfully requested that Certiorari be granted so that said error may be corrected.

VII. CERTIFICATE OF SERVICE

Three copies of this Petition for Writ of Certiorari were mailed to Henry E. Howell, Maritime Tower, Norfolk, Virginia, and three copies thereof were mailed to Richard S. Young, Professional Building, Portsmouth, Virginia, counsel of record for respondent, pursuant to the provisions of Rule 33(1) of the Revised Rules of the Supreme Court of the United States adopted April 12, 1954, before the date of the filing hereof.

Respectfully submitted,
TIDEWATER CONSTRUCTION CORPORATION,
RAYMOND INTERNATIONAL, INC., and
PETER KIEWIT SONS' CO.,
individually and trading as
TIDEWATER-RAYMOND-KIEWIT
By R. ARTHUR JETT
ROY L. SYKES
Counsel for Petitioners

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701 Citizens Bank Building
Norfolk, Virginia 23510
Counsel for Petitioners

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
Title 33 United States Code Annotated
Section 901 et seq

"§902. Definitions

When used in this chapter—

(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

JONES ACT
Title 46 United States Code Annotated
Section 688

"§688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

Present: All the Justices

TIDEWATER CONSTRUCTION
CORPORATION,
RAYMOND INTERNATIONAL, INC., AND
PETER KIEWIT SONS' CO.,
INDIVIDUALLY AND AS JOINT VENTURERS
TRADING AS
TIDEWATER-RAYMOND-KIEWIT

-v- Record No. 6976

EDWARD E. DUKE

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN
Staunton, Virginia, September 5, 1969

FROM THE CORPORATION COURT OF
THE CITY OF CHESAPEAKE
Jerry G. Bray, Judge

The plaintiff, Edward E. Duke, brought this action against Tidewater Construction Corporation, Raymond International, Inc., and Peter Kiewit Sons' Co., joint venturers trading as Tidewater-Raymond-Kiewit, defendants, for damages for injuries received while aboard a barge owned by the defendants, by whom he was then employed. On trial to a jury he recovered a verdict for $95,000.00, on which the court entered judgment and defendants were granted a writ of error.

On their assignments of error the defendants say the court erred in refusing to pass on their plea in bar, in admitting a deposition into evidence, in granting plaintiff's instruction No. 1, in refusing their instructions M and N, and in refusing to set aside the verdict as being contrary to the law and the evidence.

As plaintiff states in his motion for judgment and in his brief, his action was brought under the "Jones Act," 46 U.S.C.A., § 688, which provides, so far as here applicable, as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * *."[1]

The issue presented is, therefore, whether the plaintiff was a seaman within the meaning of the Jones Act. The cases dealing with the question are legion. "They turn on individual fact situations; no single factor is controlling, but the whole context must be considered." Annotation, 75 A.L.R.2d at 1314.

The vessel on which the plaintiff was working at the time of his injury was an ocean-going barge approximately one hundred feet long and fifty feet wide, known as the Big D. It was designed for offshore marine construction, such as light towers. At each of its four corners was a spud or leg, operated by compressed air so that at a construction site the spuds could be lowered to the ocean floor and then by means of compressed air the barge could be raised to the desired height above the surface of the water to serve as a stationary platform for the men engaged in the construction job.

The job at hand was the construction of the Diamond Shoals Light Station, off Manteo, North Caro-

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1—45 U.S.C.A., § 51 *et seq.* Section 56 of said Title 45 provides that the jurisdiction of the courts of the United States under this chapter (ch. 2) "shall be concurrent with that of the courts of the several States."

lina. This was to be the third joint venture of the defendants. They had previously constructed the Chesapeake Bay Bridge-Tunnel and thereafter the Chesapeake Off Shore Light Station.

The plaintiff first went to work for the defendants about March 1, 1965, when they were preparing the Big D for service in constructing the Chesapeake Light Station about thirteen miles offshore from Virginia Beach. During that construction plaintiff worked as a mechanic, looking after the air compressors, jacks and other machinery.

Plaintiff introduced a cardboard model of the Big D which he had made and explained to the jury the structure of the barge and some of its equipment, pointing out its four generator units which supplied the air for operating the spuds and grippers on the vessel. The barge was not self-propelled but was towed to the work site where it was to be used. It carried four anchors for use to hold the barge in place at the work site and these anchors were operated by the workmen on the barge. It was arranged so that its crew could eat and sleep on it.

During his employment on the barge at the Chesapeake Tower, the plaintiff was told that his work was satisfactory and that he would be employed on the next job, which was the construction of the Diamond Shoals Light Tower. The defendants had contracted in or before December 1964 to do that work and expected to use the Big D on the job. The Chesapeake Tower job was completed in July 1965 and plaintiff was then assigned to another job at Yorktown. He was then told, he said, that when the Yorktown work was finished "we" would come back and make the Big D ready for sailing.

On March 14, 1966, plaintiff resumed his employment by the defendants and began helping to get the Big D ready for the Diamond Shoals job. The Big D was then afloat in the Elizabeth River, secured by lines running from the stern, from the bow and from the center. It was boarded by means of a gangplank.

The plaintiff testified that the crew then on the Big D was practically the same as had been on the Chesapeake Tower job. They were, he said, a fireman, an "operator," the deck crew men called the riggers, who were also the pile driving men, and a Mr. Warren. Plaintiff was hired as a mechanic and his work was maintaining the equipment on the deck of the barge. Their purpose was to put the barge in order for the work ahead at Diamond Shoals.

When the Chesapeake job was completed, parts of the equipment of the barge were taken off and stored for protection and preservation. The master mechanic, under whom the plaintiff worked, said the vessel was "winterized" for the winter. On March 14, 1966, defendants began to prepare the Big D for the Diamond Shoals job, which was due to be completed on May 1, 1966. This preparation required a lengthening of the spuds, certain electrical work and a general overhauling of the equipment. This work required about six weeks and was within a week of being completed when plaintiff suffered his injuries.

When plaintiff came aboard on Saturday, the day of the accident, the spuds were ready to be set in position and at the time of his injuries all four had been set. On that morning he had been told they were ready for him to hook up the jacks so the air could be applied to the grips and the equipment tested over the weekend to make the vessel ready for sailing. The cook had come aboard and supplies were being brought on the barge.

At the time of the accident plaintiff was engaged in hooking up the fourth spud when he slipped and fell on grease which had been allowed to accumulate on the deck where he was required to work. In falling he knocked open a high pressure air valve which released high pressure air through the hose he was holding, causing him to lose control of the hose. It whipped around uncontrolled on the deck and struck the plaintiff, resulting in a severe fracture of his leg. He has been able to work only occasionally since.

Under their assignments of error the defendants contend, first, that the court erred in "failing to pass on" their plea in bar as a separate issue prior to submitting the case to the jury on its merits. This plea alleged that the court had no jurisdiction of the subject matter because the barge on which the plaintiff was working when he was hurt was out of service; that plaintiff was not a member of the crew; that he was not a seaman; that he was not entitled to any warranty of seaworthiness, and that his exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., § 901 *et seq.*).

After consideration the court entered an order which stated that substantially all of the evidence necessary to a trial on the merits of the case was necessary to the determination of the status of the plaintiff and of the vessel, and that these issues could be determined by the court and jury at one trial without burdening the parties and the court with two trials. Consequently, it was ordered that the defendants file their answer and that the cause of action on the merits be consolidated for trial with defendants' special plea.

The several hundred pages of testimony taken on these questions and the outcome of the case demonstrate

the propriety of this holding and distinguish this case from *Lucas* v. *Biller,* 204 Va. 309, 130 S.E.2d 582, cited by the defendants. There was no error in the procedure complained of.

Defendants next assert that the court erred in permitting the deposition of Bruce Filmore Hale to be admitted into evidence and read to the jury, on the grounds that it was not properly filed as required by § 8-314 of the Code of Virginia, and that it was not shown that the witness was out of the State as required by § 8-313.

When the deposition was offered, defendants objected only on the ground that it had not been filed as required by statute. The statute, § 8-314, provides that it shall be certified and returned by the officer taking it, or sealed and sent to the clerk of the court or to the person before whom it is to be read. The court ruled that the deposition would not be received as offered, but that if "the reporter" presented it to the court with the averment that it was correct, it would be accepted. Apparently this was done and no further objection was made by the defendants to the reading of the deposition. The objection now made that it was not proved that the witness was out of the State comes too late. It may be added, however, that one of plaintiff's attorneys made an explanation which satisfied the court on that point. It was not error to allow the deposition to be read to the jury.

Defendants next assert that the court erred in giving plaintiff's instruction 1.[2] Their objection relates only to the second paragraph of the instruction. The printed record shows no objection or exception taken to the giving of this instruction. We find, however, in the manuscript record the statement that the defendants note their exception to Paragraph 2 of the instruction, and the statement that the "defendants do not believe that the factors as so defined are in accord with those established by the Supreme Court in West versus U. S., 1959, 361 U.S. 118," and the further statement that "the factors stated for consideration by the Jury are more detailed than those given by the Supreme Court in West versus U. S." Such an exception does not comply with Rule 1:8 of Rules of Court. See *Harlow* v. *Commonwealth,* 195 Va. 269, 273, 77 S.E.2d 851, 854. Moreover, *West* v. *U. S.* was not an action under the Jones Act. It involved a libel under § 781 of Title 46 of U.S.C.A. relating to a "Liberty" ship which had been in the "moth-ball fleet" at Norfolk "in total deactivation" for several years. 361 U.S. 118, 80 S.Ct. 189, on appeal from 256 F.2d 671. It suggested no error in the giving of instruc-

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2—"INSTRUCTION NO. 1

"The Court instructs the jury that the plaintiff, Edward E. Duke, brought this suit under the Jones Act, which is an Act affording a recovery for personal injuries to seamen of various types of vessels that are in navigation at the time of the injury. For the purposes of these instructions the terms 'seamen' and 'members of the crew' are used interchangeably.

"To be in navigation within the meaning of the Jones Act, the vessel need not be on station and carrying out the function for which it is designed. You may consider the character of the work being performed aboard the vessel, the presence of the crew performing the customary work of the vessel, the measure of control by the owner over the vessel as a whole, her stage of readiness for carrying out the function that the vessel was designed for.

"The Court further instructs you that if you find that the 'BIG D' was not in navigation at the time of the plaintiff's injuries, then your deliberations are at an end and you shall find for the defendant[s], but if you find that the barge 'BIG D' was in navigation, then you shall consider the further instructions the Court now makes to you."

tion 1 and the giving of that instruction involved no reversible error.

Defendants assert that the trial court erred in refusing to give their instructions M[3] and N[4]. Again we do not find in the printed record that any objection was made or exception taken to the refusal of these instructions. We look to the manuscript record to find that defendants "noted their exception" to refusing instruction M on the ground that it was in accord with *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205, and *Antus* v. *Interocean Steamship Co.*, (C.C.A. 6), 108 F.2d 185.

In *Desper* the plaintiff when injured was on board a moored barge and engaged in painting life preservers for use on sightseeing boats which were then blocked up on land. The court in its opinion said that whether an individual was a seaman depended on the facts of the particular case and the "facts in this case are unique." Desper, the court said, was only a probable navigator and the law covered only seamen in being.

3—"INSTRUCTION NO. M

"The Court instructs the jury that even if you believe from the evidence that the plaintiff was employed on the BIG D during the construction of the Chesapeake Light Tower and even if you further believe that it was contemplated that he would also be employed on the BIG D during the construction of the Diamond Shoals Light Tower, this does not constitute him a seaman or a member of the crew thereof if you further believe that at the time of plaintiff's accident the BIG D was out of service and that at said time he was engaged in preparing the BIG D for return to service."

4—"INSTUCTION NO. N

"The Court instructs the jury that if you believe from the evidence that the BIG D was laid up and out of service for a period of approximately eight (8) months prior to plaintiff's accident, and was in the process of being thoroughly rehabilitated for return to service at the time thereof, then the BIG D had no crew, and under such circumstances you should find that the plaintiff was not a seaman or a member of the crew thereof."

In the present case plaintiff was on board a vessel afloat, almost ready for its voyage to the work site and plaintiff was engaged in fitting it for its designated task.

In *Antus, supra,* the vessel "had been withdrawn from navigation". The work being done was not even preparatory to navigation, but consisted of "preparing the vessel for winter quarters."

The present case is clearly distinguishable from *Desper* and *Antus* on its facts.

In the more recent case of *Butler* v. *George W. Whiteman,* 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754, a barge was moored to the wharf and a tug was lashed to the barge. Decedent had been engaged in cleaning the boiler of the tug and met his death by drowning under circumstances not clearly shown. He was last seen alive while running across the barge to the tug. The lower courts dismissed the action for his death under the Jones Act. In a *per curiam* opinion the Supreme Court reversed, holding that the evidence presented a jury question as to whether the tug was in navigation.

Instruction N would have told the jury that under the circumstances therein stated, which in themselves were at least of questionable accuracy, the plaintiff was as a matter of law not a seaman or a member of the crew. Under *Butler* these were jury questions.

We find no error in the refusal of instructions M and N.

The defendants assert finally that the court erred in refusing to set aside the verdict as being contrary to the law and the evidence. They say in their brief that the paramount question is whether the plaintiff was a seaman entitled to sue under the Jones Act.

In the case of *Offshore Company* v. *Robison*, 5 Cir., 266 F.2d 769, 75 A.L.R.2d 1296, in an instructive opinion by Judge Wisdom, it was said:

> "* * The Act has always been construed liberally, but recent decisions have expanded the coverage of the Jones Act to include almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable waters. * *" 266 F.2d at 771, 75 A.L.R. 2d at 1301.

Offshore Company was in the business of drilling and exploring for oil and gas. It owned and operated a drilling rig mounted on a barge with retractable legs or spuds, and operated in a fashion similar to that of the Big D. It was "strictly a drilling platform." At the time of the accident "it was resting firmly on the bottom of the Gulf of Mexico". Robison was an oil field worker. When the accident happened he was working on the main deck of the barge as a driller's helper. He had never worked as a "seaman" on board a "vessel" as those terms are ordinarily understood. He was injured when a casing fell and broke his leg. He sued the company on the ground that he was a seaman and member of the crew. His case was heard before a jury as an action under the Jones Act and the general maritime law. He recovered a verdict and judgment which were affirmed by the Court of Appeals, 5 Cir. Said the Court: "Whatever may have been the original intention of Congress, courts have given an extremely liberal interpretation to the terms 'seaman' and 'member of a crew of any vessel' without provoking any congressional amendments restricting the coverage of the act." 266 F.2d at 774, 75 A.L.R.2d at 1304.

After pointing out that the Supreme Court had held that the effect of the Longshoremen's and Harbor Work-

ers' Compensation Act was to restrict the benefits of the Jones Act to "'members of a crew of a vessel,'" the Court said:

> "Gianfala v. Texas Company, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775, reversing Texas Company v. Gianfala, 5 Cir., 1955, 222 F.2d 382, is the key case in the conversion of offshore oil field workers into seamen. * *" 266 F.2d at 774, 75 A.L.R.2d at 1304.

In that case, said the Court, the defendant contended that the drilling barge was not a vessel in navigation and that the decedent was an oil field employee whose duties were not primarily in aid of navigation; but the trial court held that his status was a question for the jury. The Fifth Circuit Court reversed, holding that decedent was not aboard primarily to aid in navigation and not as a member of the ship's crew, but as a member of the drilling crew. But the Supreme Court reversed and in a *per curiam* opinion, and without discussing the law but citing four cases, ordered that the judgment be reinstated.

In the four cases, all decided for the plaintiffs, one of the plaintiffs was a member of a drilling crew on a submersible drilling barge, one a foreman on a derrick, one a common laborer on a dredge, and the fourth a deck hand on a dredge.

The *Offshore* opinion also discussed the case of *Senko* v. *Lacrosse Dredging Corporation,* 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404. Senko was a handyman on a dredge which was anchored to the shore and used as a stationary earth-moving machine. He ran errands on shore, was paid by the hour, lived at home and brought his own meals to work. He had no duties connected with moving the dredge. He was injured ashore while placing a signal lantern from the dredge in a shed on the

neighboring bank. He brought suit under the Jones Act and a jury returned a verdict in his favor, but the trial court set it aside on the ground that the evidence was not sufficient to show that he was a member of the crew. The Supreme Court reversed and in its opinion stated that "'a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.'" 266 F.2d at 777, 75 A.L.R.2d at 1307.

After reviewing the Supreme Court decisions, the Court in *Offshore* concluded:

> "* * there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." 266 F.2d at 779, 75 A.L.R.2d at 1309.

In the present case, Duke was a member of a crew engaged in putting the barge in condition to be floated to the site in the ocean where it would be used in the construction of the Diamond Shoals Light Tower. This work was being done while the barge was afloat in the Elizabeth River, where there were large tugs, oil tanks, yachts and other vessels afloat, and had proceeded nearly to completion when the accident occurred. At that time all four of the spuds had been set in position. On

Saturday morning when the plaintiff came aboard he was told that the spuds were ready for him to hook up the jacks so the air could be applied to the grippers, and the equipment be tested over the weekend to see that it was ready for sailing. The cook had come aboard and supplies were being brought aboard. In the week following, the barge was floated to the work site and the work of constructing the light tower was begun.

We hold that under the facts as the jury could have determined them to be from the evidence, and considered in the light of the Supreme Court decisions, the plaintiff came under the protection of the Jones Act and the judgment appealed from is accordingly

Affirmed.

VIRGINIA:

Before Harold F. Snead, Chief Justice of the Supreme Court of Appeals of Virginia, on Monday, November 17, 1969, in vacation of said Court.

Tidewater Construction Corporation, Raymond International, Inc., and Peter Kiewit Sons' Co., individually and trading as Tidewater-Raymond-Kiewit,

Plaintiffs in error,

against Record No. 6976

Edward E. Duke,

Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the petition of the plaintiffs in error, by counsel, praying for a stay of execution of the judgment entered herein on October 14, 1969, in order that they may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case entered on October 14, 1969, be, and the same is hereby, stayed, until the 12th day of January, 1970, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay of execution of judgment, however, is not to become effective until plaintiffs in error, or some one for them, enter into bond with sufficient secur-

ity to be filed with the clerk of the Corporation Court of the City of Chesapeake, and approved by the judge of said court, in the penalty of One Hundred Twenty Thousand ($120,000.00) Dollars upon condition that if plaintiffs in error fail to make application to the Supreme Court of the United States for a writ of certiorari in said case within the period allotted therefor, or fail to obtain an order granting their application, or fail to make their plea good in the Supreme Court of the United States, they shall answer for all damages and costs which the defendant in error may sustain by reason of the stay, or in lieu thereof, by appropriate instrument, to be filed with the clerk of the Corporation Court of the City of Chesapeake, and approved by the judge of said court, continue in full force and effect the supersedeas bond heretofore given in said Corporation Court of the City of Chesapeake staying the execution of its judgment in this case pending the application to this court for writ of error and supersedeas, and make the said bond subject to the added conditions hereinabove specified, and which instrument shall be joined in by the surety of said supersedeas bond.

/s/HAROLD F. SNEAD
Chief Justice of the Supreme
Court of Appeals of Virginia

A Copy,

Teste:

/s/H. G. Turner, Clerk.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday, the 14th day of October, 1969.

TIDEWATER CONSTRUCTION CORPORATION, et al., etc.,

Plaintiffs in error,

against

EDWARD E. DUKE,

Defendant in error.

UPON A PETITION TO REHEAR

On mature consideration of the petition of the plaintiffs in error to set aside the judgment rendered herein on the 5th day of September, 1969, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/H. G. Turner, Clerk.